THE NATIONALIZATION OF JOINT STOCK BANKING CORPORATIONS IN SOVIET RUSSIA AND ITS BEARING ON THEIR LEGAL STATUS ABROAD

(*Continued from April issue.*)

III

In discussing the effectiveness abroad of the nationalization of the banks, especially the dissolution of the Joint Stock banks, first those states will be treated that have not yet recognized the Soviet republics.

1. On two assumptions only may the judge of such a state leave unconsidered the dissolution of the J. S. banks:

(a) if jurisprudence and court practice of that country explain the juristic personality of Joint Stock companies by the theory of a fictitious juristic person. If the juristic personality of a J. S. company rests merely on a legal fiction, then—if the old law only is recognized—it is immaterial whether the real organization still exists.

(b) in the other case, if nationalization and all its legal consequences, especially the dissolution of the Joint Stock banks, is contrary to the public order of that country.

United States courts still take the stand that the nationalization decrees are contrary to public order and are incompatible with the North American view of law. This view has already been mitigated,[103] and it is to be presumed that it will be entirely abandoned now that Germany, England, France, and even Italy,[104] have given up this reservation of an international-private-law character.

[103] See decision of the Court of Appeals of New York, Fred. S. James & Co. v. Second Russian Insurance Company, 240 N. Y. 581, 148 N. E. 713 (1925), *supra* note 7.

[104] See the decision of the Roman Court of Cassation, May 25, 1924. IL FORO ITALIANO (1924), 451.

Although, according to old precedents, the Soviet decrees are, on principle, disregarded in the United States, and although the old Russian law is considered as still existing, even the American judge will be unable to disregard the dissolution of the Russian Joint Stock banks,[105] for Anglo-American jurisprudence follows the so-called organic theory of the real corporate entity. A corporation which in effect is no longer in existence, independently of the question whether the law effecting its dissolution must be considered or not, will, on principle, not be recognized by the Anglo-American judge. In the *James* case the question at issue is whether the foreign branches are to be considered as actively legalized and capable of suing and being sued. This capacity of a branch is only a derivative one, yet the American judge admits it temporarily for reasons of equity, because the branch actually is engaged in business. "It may be decided later whether the capability still exists." In *Russian Reinsurance Company v. Stoddard, et al.*,[106] the Court of Appeals of New York has not yet answered this question. The decision rests on the assumption that the old J. S. banks continue to exist in effect as corporations, no longer in Russia, but in Paris. Starting from this foundation, the court thinks it may disregard the Soviet-Russian decrees, especially since the non-recognition of Soviet Russia, and public order, on principle, prohibit the application of these decrees.

Whether the old Russian J. S. companies continue to exist in France, remains for further investigation below. But before the recognition of the Soviet state French jurisdiction was very consistent. The former Russian Empire and its laws were regarded as still existing. French jurisprudence generally explains the juristic personality of the Joint Stock companies by the theory of fiction. If the old law was recognized. the juristic persons created by it had also to be recognized. The maintenance of the old organization, the coöptation of new members of the directorate by an executive committee whose term of office had ex-

[105] "The alarming position abroad of Russian corporations of the old regime," 37 HARV. L. REV. 606 (1924).

[106] 240 N. Y. 149, 147 N. E. 703 (1925), *supra* note 3.

pired, the transfer of the domicile of the Russian J. S. companies into France was regarded as contrary to the statutes, it is true, but justified by *"force majeure."* [107]

The Swiss Confederated Court, which likewise adopts the doctrine of the real corporate entity, has considered the old J. S. banks as dissolved, in spite of the non-recognition of the Soviet republics, and does not consider even the Swiss branch as legitimized. On principle, the Swiss courts disregard Soviet legislation. In spite of this, the Confederated Court, without adducing the reservation of private-international law, makes its decision depend solely on the question whether the real corporate entity of the J. S. banks—formerly legally recognized—continues to exist in Soviet Russia or has been destroyed by the Soviet state. The court recognizes the effectiveness of the Soviet decrees, though, for the rest, it denies on principle the normative effectiveness of Soviet legislation.

2. The House of Lords was compelled to apply the Soviet laws and, after the precedent of *Luther v. Sagor* [108] could not claim that the decrees of nationalization are contrary to English public order. Following the Swiss view that the branch is part of the main house and legally inseparable from it, the highest English court could not rest satisfied with recognizing the legal standing of the English branch temporarily for reasons of equity. Rather it had to go back to the principal question and to investigate whether the old J. S. banks had retained their juristic personality. In this, the House of Lords faced a double difficulty: first, it had to decide the question for the moment of the instant judgment, July 22, 1924; second, it would not suffice to establish the fact that the J. S. banks continue to exist as ficti-

[107] See M. Champcommunal, *La condition des Russes a l'Étranger, spécialement en France,* XIX REVUE DE DROIT INTERNATIONAL PRIVÉ 331 (1924). The Italian courts had ceased to apply the old law even before the recognition of Soviet Russia by Italy. A judgment, Tribunale di Genoa, May 19, 1923, called the old law a *"cadavere legislativo,"* 50 JOUR. DU DR. INT. (CLUNET) 1021 (1923).

[108] *Supra,* note 5.

tious juristic persons because the Soviet decrees did not expressly withdraw this right from them.[109] The English view sees the nature of a legally recognized corporation on principle in the real corporate entity, not created by the law, but merely recognized by it. While the American decisions presuppose the effective economic existence of the J. S. companies, the House of Lords, in conformance with the old precedents, considers it sufficient that the legal personality of the organization, the association as such, still exists, regardless of whether it exercises its economic functions or not.

The House of Lords considers the decree of December 14, 1917 as merely a general political declaration; the decree of January 26, 1918 is considered insufficient, for the reason that the annulment of the shares contradicts the surrender and transfer of the shares to the People's Bank ordered at the same time. It is true that the domestic court, according to an often enunciated maxim of international private law, is not bound to follow the foreign interpretation in applying foreign laws.[110] Nevertheless, the House of Lords apparently distrusts its own interpretation to a certain extent and Lord Cave adduces as an additional support the fact that the decree of January 26, 1918, was given only by the Council of People's Commissars, but not by a legislative body.[111] In this the English judge manifestly errs; for Art. 38 of the constitution of the R. S. F. S. R. of July 10, 1918, expressly bestows upon the Council of People's Commissars the right to issue decrees and ordinances of all kinds. Lord Cave further supports that interpretation with the argument that the decree of January 26, 1918, in his opinion, could not confiscate any shares belonging to persons not subject to Soviet jurisdiction.

[109] But the English court came much nearer to this view in adducing in the interpretation of the Soviet decrees that provision of the Swod Sakonoff which in my view has been abolished, and, following the Russian experts who start from the "fiction" theory, it declared that a J. S. company could juristically be dissolved only by a special act of the state.

[110] See PILLET, TRAITÉ PRATIQUE DE DROIT INTERNATIONAL PRIVÉ (Paris, 1923), I, 151; v. BAR, THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS (Hannover, 1889), I. 138; A. WEISS, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT INTERNATIONAL PRIVÉ (Paris, 1912), III, 187, 196; also A. HABICHT, INTERNATIONALES PRIVATRECHT (Berlin, 1907), 44.

[111] [1925] A. C. 124-5-6.

Since there was a large number of such shares, he assumes that the corporation has not perished.

The uncompensated expropriation of foreigners is inadmissible in international law. But the expropriation is not ineffective. It is only necessary to grant to the foreigner a preferred position by giving him compensation, as compared with the domestic owner, who is expropriated without such compensation.[112] But the R. S. F. S. R. in the provisional commercial agreement with Great Britain has declared itself ready in principle, to compensate the Englishmen expropriated by Soviet decrees. Accordingly, Lord Cave's argumentation, in so far as it refers to the shares of Englishmen living in Russia, cannot be supported by that international law maxim, even disregarding the fact that this maxim does not touch upon the real effect of the expropriation.

A different question is whether the shares of foreigners living outside of Russia could be expropriated by decrees of the Soviet government, so that the argumentation of the English judge must be interpreted as only referring to this. Expropriation is an act of state sovereignty; a state can only perform acts of sovereignty within its boundaries, and beyond these, only as regards its own citizens. However, we must ask, is the annulment of a share an expropriation? As a security, the share is treated in many respects as subject to maxims of real law, but principally it represents membership viewed as right of personality, and the participation in the property of the company, as regards property rights, is only secondary. The House of Lords, in other places, very often emphasizes that the confiscation of property can not touch the "legal entity" of the J. S. companies.[113] The participation in property rights, which is inseparable from the right of membership, does not constitute ownership

[112] A. VERDROSS, *Zur Konfiskation auslaendischen Privateigentums nach Friedensvoelkerrecht*, ZTSCHR. F. OEFF. RECHT, Year IV (1924), Vols. 3 and 4, 321 *et seq.*; DESPAGNET, COURS DE DROIT INTERNATIONAL PUBLIC (4th ed.), 487; also A. STRUPP, DAS VOELKERRECHTLICHE DELIKT, 118.

[113] That the prohibition of industrial activity renders the right of participation permanently valueless and has for its indirect consequence the dissolution of the J. S. company, has not been considered by the House of Lords and need not be enlarged upon again here.

nor any other real right in the property of the company. It is merely a quota of the basic capital, specially secured by the absolute right of membership. But the basic capital, the totality of the statutory contributions of the members, is a special obligation of the company, as an independent unity, toward the members. The property-right element of the share is only "a claim to that part of the value of the proceeds of liquidation,[114] which corresponds to the quota of the basic capital."

Accordingly confiscation, and annulment, of a share is nothing but uncompensated abolition of a personal right and of the conditional obligatory claim indissolubly connected with it. The maxim of international law that things belonging to foreigners and situated abroad cannot be expropriated does not prevent the international effectiveness of the decree of January 26, 1918. But that the abolition of a membership right, originating in Russia and to be exercised only there, and of a claim indissolubly connected therewith, likewise originating in Russia and only executable there, should be ineffective for the English judge, with the additional fact that the Soviet state, on principle, assures the English citizen of a compensation—that seems dubious.

The interpretation of the decree of January 26, 1918, "on the confiscation of the stock capital of the former private banks" adopted by the House of Lords rests solely on the freedom of interpretation of the foreign judge, which is not entirely uncontested. Lord Cave's argumentation from international public law can support this interpretation as little as his argumentation from public law which contradicts the clear verbiage of the constitution of the R. S. F. S. R.

The House of Lords, indeed, interprets the decree of January 26, 1918, thus: the shares of the J. S. banks found in Russia were to be transferred to the People's Bank and a property merger was decreed, which was carried out later on by the instruction of December 10, 1918.[115] But it does not conclude therefrom that during the course of this fusion the private J. S. companies

[114] LEHMANN-HOENINGER, LEHRBUCH DES HANDELSRECHTS (1921), 315; see also BEIGEL, BUCHFUEHRUNGSRECHT DER AKTIENGESELLSCHAFTEN, 3.

[115] *Supra*, note 51 and text, p. 405.

were dissolved as independent organizations. Lord Finlay says verbatim "it is clear that an amalgamation can be carried out without annihilating the existence of the amalgamated corporations." That is incontestable. Practically, however, a presumption speaks against it and the entire wording of the instruction of December 10, 1918, will justify this interpretation. It is true, the House of Lords had not before it the circular letter of August 30, 1921, completing the liquidation, nor the preceding ordinances of June 30, 1918, February 6, 1919, March 4, 1919, July 14, 1919, so that one may perhaps assume that the Lords would have reached a different decision, had they known them.[116] From the declaration of the law on the completion of the nationalization and liquidation, even from the standpoint of the House of Lords, the conclusion was inevitable that the J. S. companies which were in process of amalgamation and liquidation were dissolved, commencing August 30, 1921. Dissolution is also indicated by the recodification in the code of Civil Law, coming into force on January 1, 1923.

Still another point appears unintelligible. A foreign juristic person, according to the doctrines developed in the international private law of all states, is recognized only, if it is recognized in its native state, or in the state of its domicile. Recognition is only granted if agreed upon by a treaty between the respective states, specifically by a treaty of commerce—this is the French and the Russian view [117]—or per se, as the English judgment says, from reasons of the comity of nations, because the foreign juristic person is recognized as legal in its own state—that is the English and the prevailing German view.[118] According to Eng-

[116] *Supra,* notes 48 to 56 and text, pp. 404 to 408.

[117] S. PILLET, *op. cit., supra,* note 110, Vol. 2, 802, 817; *idem,* DES PERSONNES MORALES EN DROIT INTERNATIONAL PRIVÉ (Paris, 1917), 186; WEISS, *op. cit., supra,* note 110, Vol 2, 483; F. SURVILLE, COURS ÉLÉMENTAIRE DE DROIT INTERNATIONAL PRIVÉ (Paris, 1925), 715 *et seq.*; KLIBANSKI, HDBCH, Vol. 3, rem. to par. 2139, note 2, 308; P. WAUVERMANS, *Les sociétés anonymes étrangères en Russie,* REV. DE DROIT INTERNATIONAL PRIVÉ 71, 496 (1905); BARON BORIS NOLDE OTSCHERK MESHDUNARODNAWO TSCHASTNOWO PRAWA (Outline of international private law); appendix to LISZT'S INTERNATIONAL LAW (Russian ed. Riga, 1923), 506 *et seq.*

[118] WESTLAKE-BENTWICH, PRIVATE INTERNATIONAL LAW (1922), 369 *et seq.*; DICEY (1922), 163 *et seq.*; ZITELMANN, INTERNATIONALES PRIVATRECHT, VOL. 2, 116 *et seq.*; REICHSGERICHT 83/369; v. BAR, *op., cit., supra,* note 110, Vol. I,

lish international law, therefore, the recognition of a foreign juristic person is an act of courtesy toward the state which originally has granted legality to it. If the House of Lords manifestly disregarded these maxims, it appears that for politico-legal reasons it wished to render an unusual decision, which may be equitable, but can be used in jurisprudence only with the greatest caution. Nothing would have been simpler for the English court than to inquire of the Soviet Russian officials whether the juristic personality of the old J. S. banks was still to be recognized. There is no doubt that the reply would have been decidedly negative. But if, since the *de facto* recognition of Soviet Russia, equal in the prevailing English view to *de iure* recognition, Soviet Russian personal statute law applies to Russian physical persons, the same doctrine will have to be applied to Russian juristic persons. Those Russians who have not recognized the Soviet state are considered in England as without a country since the decree of December 15, 1921. But a juristic person without a country is unthinkable.[119]

The same reasoning applies to the judgment of the Kammergericht, which intentionally follows the House of Lords. The Kammergericht, too, in the opinion of many, is bound by no interpretative norm in interpreting the Soviet-Russian law. But not only did it disregard the circular letter of July 1921, and the before-mentioned ordinances of 1918 and 1919, but, in contrast with the House of Lords, also disregarded the instruction of December 10, 1918, though this was before it at the time. This was the sole method by which it could reach the decision that the

302; MAMMELOK, DIE JURISTISCHEN PERSONEN IM INTERNATIONALEN PRIVATRECHT (1900), 35; SCHWANDT, ZEITSCHRIFT FUER AKTIENRECHTWESEN (1912), 32; G. WALKER, INTERNATIONALES PRIVATRECHT (Wien, 1921), 128 *et seq.*; HABICHT, *op. cit., supra,* note 110, at 83.

[119] Rakowski, Russian chargé d'affaires in London, declared publicly after the decision, that the interpretation of the House of Lords was at variance with the Russian interpretation: "According to the legislation of the Union of Soviet Socialist Republics now in force, all banking institutions and firms instituted on the basis of former Russian laws terminated their existence as independent legal persons, with all the consequences ensuing therefrom, from the date when the laws relevant to the matter entered into force." Whoever was carrying on transactions contradicting this view, was violating the interests of the Soviet Union, and the same be hereby warned. See v. MENDELSSOHN-BARTHOLDY, *op. cit., supra,* note 10, at 1919.

former J. S. banks were still in existence as juristic persons in the spring of 1922.

The reasoning of the Kammergericht rests also on the fact "that the Soviet government has not yet claimed the property values of Russian banks abroad as property of the Soviet republic." Whether, with regard to the proceedings in France, this will remain so, may be left undiscussed. At any rate, it is not apparent why the banks should be treated differently from the other Joint Stock companies. The decree of March 4, 1919, nationalized the shares of the other nationalized J. S. companies. The Soviet state has already laid claim to the foreign property of other J. S. companies. Of the claims made before the decision of the Kammergericht, several were made before the American Admiralty Courts, demanding the surrender of nationalized ships.[120] The claims of the Soviet state were rejected. But the fact that they were made proves that, in principle, the Soviet state lays claim to the foreign property of the nationalized J. S. companies.[121] If the Soviet state has not yet claimed the foreign property of the former banks, this rests practically on the circumstance that the foreign property of the former banks in the main was precisely in those states which had not yet recognized the Soviet government.

The House of Lords thinks that neither the decree of December 14, 1917, nor the decree of January 26, 1918, relates to the foreign branches. It assumes that these foreign branches were not to be subjected to the process of liquidation ordered in the instruction of December 19, 1918, although the Petrograd main house, under the old firm style, but as a department of the People's Bank, has tried to give instructions to the London branch. The court concludes that the plaintiff company, in spite of the complete expropriation in Russia, remained the owner of the English branch. The question whether the organization of the old banking company is still effective was not discussed by

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[120] The Penza, 277 Fed. 91 (E. D. N. Y. 1921); The Rogday, 278 Fed. 294, 279 Fed. 130 (N. D. Calif. 1920).

[121] A. KANTOROWITSCH, *op. cit., supra,* note 17, at 142; see A. GOICHBARG, EZHEDNIEVNIK SOWJETSKOI JUSTIZII (1925), No. 24, 858 *et seq.*

the court. It merely investigated the power of attorney of the London branch manager and reached the conclusion that the correspondence of the Petrograd main house, as department of the People's Bank, with the English branch showed the confirmation of this power of attorney; no distinction can be made between dealings with a foreign state or with a private foreign director (Lord Atkinson). Perhaps this formulation tends to show that the English judge does not consider the continuance of the company quite free from doubt. Lord Finlay, in case the power of attorney of the English branch manager should prove extinct, wishes to treat him as manager of the liquidation "of those in control of the English branch" and carefully avoids the question whether the organization of the old company can still be recognized. But Lord Wrensbury states: even assuming that the old company had ceased to exist, it would, in any case, have to be considered in England as a "liquidating company" under civil law. It is also significant that Champcommunal, who has considerable scruples about applying the decrees of nationalization, in discussing the decision of the House of Lords [122] stresses just this argument of Lord Wrensbury which starts from the extinction of the former juristic person.

The decision of the House of Lords has produced a merely temporary solution. The power of attorney of the English branch manager cannot be maintained indefinitely and Lord Cave points to the fact that the liquidation of the company has been ordered and the Official Receiver has been appointed liquidator. The only question is, how the dissolution of the old company shall be effected, especially since it follows indirectly from the judgment that no remnants of the former organization exist. Apparently the totality of the English shareholders is to be considered as a liquidating company of the only task is to distribute among the former shareholders the property of the former J. S. bank situated in England, under the form of a liquidation ordered by the court. If the old banking companies, as is here assumed, do no longer legally exist, this would have created merely formal

[122] Champcommunal, *op. cit., supra,* note 107, at 546.

difficulties for an order of liquidation. Even if the decision of the House of Lords had been rendered differently, a trustee might have been appointed for the property of the English branch. In the end, the question of the fate of the foreign branch will depend on this, whether the property of the old banking companies situated abroad has fallen to the Soviet state or to whom it otherwise belongs.

The French court practice faces special difficulties. So far, in France the Russian companies, which are economically very important, have been considered as continuing in existence and every occurrence connected with the Soviet revolution has been justified by *"force majeure."* [123] Scruples about this have been voiced recently. It has been objected that the notion of *"force majeure"* is applied only to the discharge of debts.[124] Before the recognition of the Soviet republic these objections could not make themselves heard.

But since the recognition, in connection with the receivership ordered for the Russian banks in Paris, the French standpoint has been changed materially. The order of receivership is charged to the most divergent causes [125] and is being energetically attacked. Apparently it is a measure of public safety. The motion of the Procureur de la Republique, October 22, 1924, says:[126]

> "In view of the fact that since the revolutionary events in the old Russian Empire certain goods and rights are found ownerless. . . ."

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[123] Trib. com. Seine, May 20, 1921: Kharon v. Banque pour le commerce et l'Industrie, 50 JOUR. DU DR. INT. (CLUNET) 533 (1923); Trib. com. Seine, Jan. 16, 1922: Banque russe pour le commerce étranger, 50 JOUR. DE DR. INT. (CLUNET) 539 (1923) (the court recognizes the transfer of the Directorate to France); Trib. com. Seine, April 26, 1922: Vlasto v. Banque Russo-Asiatique, 50 JOUR. DU DR. INT. (CLUNET) 933 (1923) (the directorate is declared to have the power of coöptation into the executive committee); Grouber and Tager, 51 JOUR. DU DR. INT. (CLUNET) 21 (1923) (the old executive committee remains despite the termination of the term of office).

[124] WAHL, LE DROIT CIVIL ET COMMERCIAL DE LA GUERRE, Vol. 3, *223 et seq.*

[125] Some assume that the officials have been moved to this step by one of two disputing groups of shareholders, others suppose that it is a step of the French organization of creditors of Russia; that has been denied in the meantime. Others again believe that the state has intervened. See *La séquestration des banques russes ou autres,* 3 REVUE DE DROIT BANCAIRE, 49 *et seq.*

[126] *Supra,* note 20 and text, p. 394.

In the relevant decree of the president of the Seine court, it is presupposed that the suit deals with ownerless objects and rights where the competence is doubtful. The decree has been attacked because the matter at issue is a general measure in which the individual objects and rights have not been separately named. The permissibility of such measure under civil law had already been energetically attacked in the French literature in the case of the receivership ordered for German property during the War. At the time, Barault in a comprehensive study proved that the order of a general receivership (ordonnance de séquestre général) does not conform to the "mesure réglementaire" declared inadmissible by Art. 5 Code Civil.[127] This view has prevailed and the order of October 22, 1924 is therefore generally considered legal.[128]

But the receivership does not affect the company as such, as has been often erroneously assumed.[129] It does not interfere with the business transactions and the organization of the company, but refers only to the "ownerless objects and rights."

The second order, November 29, 1924, which extended the receivership of the first order to the property of the French branches of all Russian companies, specifically of the banks which in Russia are subject to the legislation of the R. S. F. S. R., contradicts the first order to a certain degree. The first order deals only with the administration of ownerless property. The second order speaks of "rights and interests retained or exercised by all Russian companies," so that one has the impression that it deals with the property of definite persons, while the first order relates precisely to ownerless property.

This seeming contradiction is removed by the official motion underlying the second order. This second order transcends

[127] BARAULT, *Essai sur la théorie générale de l'administration des biens des sujets ennemis*, REV. DE DROIT INTERNATIONAL PRIVÉ (1919). The "mesure réglementaire," it is commonly held, presupposes an indeterminate number of persons and relates to future, still uncertain, events; it corresponds thus to an administrative measure.

[128] A. Perret, *Le séquestre des banques russes en France*, 6 RECUEIL JURIDIQUE DES SOCIÉTÉS, 57 *et seq.* (1925).

[129] A. MATER, 3 REV. DE DROIT BANCAIRE 55 (1925); P. WOHL, 5 OSTEUROPA MARKT 6 (1925).

the first and starts from the premise "that the legal status of the French branches is dubious and a statutory management of the old companies is impossible." Now the general French assumption is that the old J. S. companies have been abolished by Soviet Russian law,[130] that the French branches, which depend on the legal fate of the main houses, cannot continue to exist and that the property of former Russian J. S. companies has been transferred to the Soviet state according to the Soviet law.[131]

From this the most divergent conclusions are drawn. Champcommunal assumes that the nationalization decrees, at least in-so-far as they order the dissolution of the J. S. companies, are acts of state sovereignty and effective only within the S. S. S. R.[132] According to him, the French judge need not regard them, for the simple reason that they were issued in favor of one party. He refers for this to Pillet [133] and states the maxim that not only purely political laws, but also special laws of a public-law character which wish to advance the property interests of a single person and make lawless a whole class of persons, are ineffective for the foreign judge. Champcommunal holds that this maxim is international legal usage. As examples he quotes the fact that the attempt to extend the sequestration of enemy property ordered by the belligerent states to property situated in neutral countries were rejected by the judges of these states. In addition he supports his contention by two Paris decisions from the last century: the first case deals with the confiscation of the property of the Duke of Brunswick. The court refused to extend the order of confiscation to the property of the duke situated in France.[134] In the second case the court refused to apply an ukase of the Tsar which in 1845 had declared forfeited the prop-

[130] Champcommunal, *op. cit., supra,* note 107, at 362; Perret, *op. cit., supra,* note 128, at 52; apparently also André-Prudhomme, *La reconnaissance en France du gouvernement des Soviets et ses conséquences juridiques,* 52 JOUR. DU DR. INT. (CLUNET) 321 (1925).

[131] André-Prudhomme, *op. cit., supra,* note 130, at 364; Perret, *op. cit., supra,* note 128, at 60.

[132] Champcommunal, *op. cit., supra,* note 107, at 364.

[133] Pillet, *op. cit., supra,* note 110, at 731; "Le droit international n'admet pas qu'une disposition légale, inspirée par des moments purement politiques, puisse produire des effects a l'étranger."

[134] Paris, Jan. 16, 1836, 2, 70.

erty of Count Potocki.[135] He adduces also the suits connected with the expropriation of the monks of Chartreux. The foreign courts rejected the claims of the French liquidators for the reason that the transfer of the trade-mark of the liqueur and the right of exclusive manufacture to the French state were based on a political-social law.[136] Champcommunal even refers to Art. 297f (!) of the peace treaty of Versailles, where the return of the property of subjects of the Allied and Associated Powers, taken by German war measures ("Uebertragsanordnungen) is demanded!

Diverse objections may be raised. The adduced criterium of Pillet (disposition légale inspirée par des motifs purement politiques) is relevant unconditionally for all quoted cases, but Champcommunal's own criterium is not. The confiscation of the property of Count Potocki, who was the head of the Polish movement for freedom against the Tsar, is a political act. The Tsar intended to make the revolutionist Potocki politically harmless, the motive of personal enrichment was only secondary. For the banishment of the monks of Chartreux the purely political motives, postulated by Pillet, were determining: it was a war measure in the fight with the Roman Church. But regarding the Art. 297f of the Versailles treaty, it seems to prove rather the contrary, for all "Uebertragsanordnungen" of the Allied and Associated Powers remain in force and Germany is obliged to recognize them.

To apply Pillet's criterium, we ought to establish that the nationalization decrees of the Soviet government are purely political acts. But the nationalization legislation is the foundation of the entire private and public legal order of Soviet Russia (see par. 19 and 59, note 1 of the Russian Code of Civil Law). The idea of a political law is colorless. A law is political, if, without immediate connection with the entire private and public legal order of a country, as a special law it intends merely to advance the immedi-

[135] Trib. civ. Seine, May 7, 1873, JOURNAL DE DROIT PRIVÉ (1875) 20.

[136] LG. Hamburg, Dec. 11, 1908, JOURNAL DE DROIT INTERNATIONAL PRIVÉ (1907) 525.

ate interest and the power of the state.[137] When the decrees of nationalization were issued, all law was valid only "in so far as it harmonized with the social-revolutionary and Bolshevist party program." The abolition of private property in the means of production, a demand raised also by the socialists of other countries, was the programmatic basis of the new revolutionary legal order and a determining administrative maxim of the Soviet state. The nationalization legislation was an important part of the new system, but no special legislation; it served principally the erection of the new economic organization. Add to this, that most nationalization decrees, specifically the decrees on nationalization of the banks, originated from purely economic considerations under the stress of war, counter strike and boycott.[138] If for the Marxists these economic considerations differed from those customary in the France of today, this difference is not proof of the political nature of those laws.

Neither does Champcommunal's own criterium apply to the Soviet Russian nationalization legislation. For these laws are not special laws of a publico-legal character which intend to advance solely the property interest of a single person, *viz.*, the communistic party. The expropriations were not made for the benefit of the communistic party, but for the common benefit. Even the state itself acquired no private fiscal property by the nationalization. The nationalized property was devoted to the common advantage and received a new publico-legal content.[139] Champcommunal's criterium is a mere variation of Pillet's, by assuming for a law selfish motives in the legislator. If one assumes selfish motives for the nationalization laws, then the programs of all socialist parties must be called selfish. Klibanski spoke of a "hypertrophied" idealism of the Soviet legislation.[140]

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[137] See REHM, ALLGEMEINE STAATSLEHRE, 8 *et seq.*

[138] Wjestnik Narodnawo Kommissariata Torgowli i Prommyschljennosti, June 1, 1918, No. 1, p. 43.

[139] *Supra,* note 87 and text, p. 534.

[140] KLIBANSKI, J. W. (1920) 606; FREUND, 51 JOUR. DU DR. INT. (CLUNET) 54 *et seq.* (1924).

It would be different, if Champcommunal would argue that the Bolshevist legislation created a *"privilegium odiosum"* for the nationalized banks. Because of his connection with the *Potocki* case, his arguments have been erroneously interpreted in that sense.[141] Foreign countries do not recognize the *privilegium odiosum.* But did the Soviet Russian decrees of nationalization create a *privilegium odiosum?* Certainly not for the individual persons to which they applied. ALL the bourgeois, industrials and merchants are treated unfavorably in the nationalization legislation. But we may not even speak of a special law for industrials and merchants: the entire bourgeois class as such, all persons not sustaining themselves directly from wages, are deprived of certain public rights, and private industrial or commercial activity, which is typical for them, is generally limited or prohibited, independently of the class to which they belong. This general "political fight" legislation, which relates not so much to the social position of the person as to a definite kind of activity, destroys the boundaries of a *privilegium odiosum,*[142] for the old common law was no longer valid. The war-communistic legislation had the same transitory character in regard to private law as, let us say, the legislation of the German war administration of an economic character.[143] Already on May 22, 1922, the decree on maxims of private law in reference to property rights restored the foundations of the law of private property. At the most, Champcommunal's objections might be supported by the "ordre publique," and it might be said that the nationalization legislation as an entity was contrary to the public order of a bourgeois state.

André-Prudhomme has likewise taken refuge in the notion of "ordre publique." [144] But he does not extend it to exclude by the clausula of reservation the Soviet legislation in its entirety,

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[141] WOHL, J. W. (1925) 1300.

[142] Paulus, Digest 1, 3, 16: ius singulare est quod contra tenorem rationis propter aliquam utilitatem auctoritate constituentium introductum est. If the old *"ratio,"* the old common law was no longer valid, one cannot speak any more of a *"ius singulare odiosum."*

[143] *Supra,* notes 72 to 76 and text, pp. 530 and 531.

[144] André-Prudhomme, *op. cit., supra,* note 130, at 322.

he reserves for the French judge the right to decide from case to case whether the Soviet law is contrary to the "ordre publique." If, however, André-Prudhomme assumes that the reservation of international private law will be applied with the greatest frequency in reference to the decrees of nationalization, the view of the French state does not justify the assumption. The idea of "ordre publique" is determined by points of view, not only of private law, but chiefly of public law. Even though the French judge is independent, he will not be able in a concrete case simply to disregard the idea of public order maintained by his own state.

We have already mentioned that the courts of the most important states have given up the objection that the decrees of nationalization are contrary to public order. Is it to be imagined that the French jurisdiction will retain the old maxim in opposition to that of Germany, England, Italy, Scandinavia? Perret, and quite a number of other authors, assume that the "ordre publique" can no longer be used in objecting to the decrees of nationalization. It appears that the Procureur de la République —and that means the French ministry of Justice also—has this conception, for otherwise the sequestration motions of October 22, 1924, and of November 20, 1924, are unintelligible. Meantime it has been established by Soviet Russian sources, that during the negotiations between Krassin and the French government, preceding the *de iure* recognition of Soviet Russia and connected with a Franco-Russian commercial treaty, it was expressly agreed that the French government should see to it that the courts should no longer oppose the "ordre publique" to the Soviet decrees.[145]

In Esthonia, where the vicinity of the R. S. F. S. R. is likely to afford a more direct legal view than in West Europe, there has never been any doubt that the old Russian J. S. companies were dissolved by the nationalization decrees of the Soviet government.

[145] A. KANTOROWITSCH, in the official periodical SOWJETSKOJE PRAWO (1925), No. 3, 41, gives an account of the treatment of the branches of juristic persons of the former Russian law abroad and mentions that the decision of the Tribunal de la Seine in re Bunatjan v. Obtorg, which refused to apply the Soviet Russian law of nationalization on account of the "ordre publique" had for its consequence the departure of Krassin and his commercial delegation. See 51 JOUR. DU DR. INT. (CLUNET) 133 *et seq.* (1924).

As early as 1920, an Esthonian law was passed "concerning the administration of those Joint Stock companies and associations confirmed by the Russian government, which have owned property or enterprises within the borders of the Esthonian state." These companies were to call a general stockholders' meeting within two months after the passage of the law. If this did not take place, then the enterprises of the company were to be considered *res nullius*. This law was supplemented by an ordinance of 1921, which simply orders a receivership for the property of the old Russian J. S. companies. The ordinance states expressly that the old J. S. companies no longer exist. This applies also to the J. S. banks.[146]

A Latvian law of July 31, 1924, states that "the former Russian J. S. companies, active before November 18, 1918 in the Latvian territory, must be liquidated in accordance with their constitutions." The law gives as the reason for this the fact that the old J. S. companies are no longer "represented in a statutory or legal fashion." [147] Thus Latvia supposes that there are still remnants of the organization of the old J. S. companies and is going to liquidate these in accordance with special rules.

This approaches the standpoint of Champcommunal, who however proposes liquidation according to the old statute and the old law.[148] But this would prove possible only in the rarest instances. Whether such a liquidation is at all admissible in France depends on the question to whom the foreign property of the former J. S. companies belongs. In Esthonia and Latvia, according to the peace treaties with Soviet Russia, all Russian state property has been transferred to that state in whose territory it was found on the day when the treaties were concluded. Legally, Esthonia and Latvia are therefore in the position that they can consider the property of the former J. S. companies found within their territories either as belonging to themselves or, considering domestic shareholders, as *res nullius* and seized by the state, as far as no other right is opposed to it.

[146] E. Hunnius, *Das Schicksal der russischen Aktiengesellschaften in Estland*, 1 GESETZGEBUNG UND RECHTSPRAXIS DES AUSLANDES 71.

[147] 1 ZEITSCHR. F. OSTEUROP. RECHT 93 (1925).

[148] Champcommunal, *op. cit., supra*, note 107, at 366.

IV

The legal fate of the foreign branches of the old Russian J. S. banks depends, in the last analysis, on the question to whom the property of the dissolved J. S. companies situated abroad belongs. Three possibilities are imaginable:

1. It may be assumed that the foreign property of the old J. S. banks has become *res nullius*. This necessitates two premises:

(a) that the old banks have lost their status as juristic persons and have no longer any legal standing even abroad;

(b) that the nationalization decrees have not transferred the property situated abroad to the Soviet state.

2. The stand has also been taken that the foreign property of the former J. S. banks has reverted to legal successors—under private law—of the old J. S. companies, who, under the old firm style, form a civil company of foreign law. The premises for this are:

(a) that the foreign property has reverted to those liquidation companies of civil law without a special act of transfer;

(b) that either the nationalization decrees do not relate to the foreign property or that, from reasons of international public law, they cannot be applied with reference to this foreign property.

3. A further possibility is that the foreign property of the old J. S. companies, just like that within Russia, has been transferred to the Soviet state.

The first conception is represented by the Esthonian legislation. But the Esthonian law probably has to do with the fact that, in the peace treaty between Esthonia and Soviet Russia, the transition of the Russian state property situated in Esthonia to the Esthonian state was agreed upon. If the law urged the shareholders to call a general stockholders' meeting within the brief space of one month (two months above), this was presum-

ably done merely to secure the rights of the Esthonian shareholders and of those companies which now were preponderantly controlled by Esthonian citizens.

The motion of the Procureur de la République, of October 22, 1924, also designates the property of the old J. S. companies situated abroad as *res nullius*. But both Perret and André-Prudhomme assume that this rests only on the fact that the order of the president of the Tribunal de la Seine was issued six days before the *de iure* recognition of Soviet Russia. At that time it was impossible to assume that the foreign property of the old J. S. companies had been transferred to the Soviet state. Both authors consider the ordinance of October 22, 1924 a measure of security on the part of the French state, which recognizes indeed, that the property of the old J. S. banks situated in France, has been transferred to the Soviet state, but for reasons of public interest wishes to protect the claims of the French creditors against the Russian state, as is also mentioned in the motion of the French authorities, and which will oppose the claims of the French creditors to the Soviet state claims of surrender. The former president of the Russian liquidation commission expressly says that the intention is to procure a pledge in favor of the French holders of Russian securities (de constituer un gage en faveur des porteurs français de valeurs russes). To treat the foreign property of the old J. S. companies as *res nullius* would result practically in very awkward situations. The recognition of the Soviet state by France is retro-active.[149] Accordingly, for seven years property *nullius* had been disposed of. The debtors of the old J. S. companies would have fulfilled their obligations to persons not entitled thereto. A countless number of lawsuits would follow and these conditions, so irremediably confused, could be cleared up only by a constant application of the *exceptio doli præsentis* and by considerations of equity of every sort.

Lord Wrenbury was the first to state the thesis, in the decision of the House of Lords of July 22, 1924, that the property situated abroad had reverted to the liquidation companies under

[149] *Ibid.*, at p. 340.

civil law which had replaced the old J. S. companies, provided it were to be assumed that the old J. S. companies had been dissolved. Possibly the argument of Lord Wrenbury that a foreign J. S. company is to be treated at home like a domestic company of civil law, and that its juristic personality granted by the foreign state is recognized only for reasons of international law, corresponds to English law. But it appears doubtful that every foreign J. S. company should at the outset be divided into a civil company of domestic law and a juristic person of foreign law. One might just as well say that every domestic J. S. company is a company of civil law which by certain organizing legal acts acquires in addition the right of a juristic person. Such a view is contrary to the prevailing opinion. True, before the J. S. company is legally existing, the members form a civil company. But this company has the sole purpose to establish a Joint Stock company. As soon as the Joint Stock company has been formed, the civil company perishes and does not continue to exist alongside of the new Joint Stock company—this corresponds also to the prevailing theory of identity. When a domestic Joint Stock company has been dissolved, there remains a liquidation company, the so-called Joint Stock company in process of liquidation. This liquidation company is merely the continuation of the old Joint Stock company and still possesses its juristic personality, which is, however, limited to those transactions required for the purpose of the liquidation.

Lord Wrenbury's thesis, rightly interpreted, presupposes that the place of the old Joint Stock companies has been taken either by foreign liquidation companies with limited legality, or by foreign associations without such. If, according to Art. 10, div. 2 of the German E. G. B. G. B., the rules for the company are applied to foreign unrecognized associations, this rule presumes that there existed abroad at least an association lacking legal standing. According to the prevailing German view, German right of association must be applied to a foreign association which lacks legal standing.[150] Apparently however, Lord Wren-

[150] KUHLENBECK, note 2 to Art. 10 E. G. B. G. B.; NIEDNER, note 7; HABICHT, 31.

bury is not satisfied with treating the foreign, no longer legally qualified, associations at home like domestic companies of civil law. He wants to comprise the domestic former shareholders, "those in control of the English branch," in an independent English company of civil law.

The Soviet Russian Joint Stock companies, especially the banks, lost their juristic personality without first going through a regular process of liquidation. Nor can the former shareholders, according to Soviet Russian law, be considered private companies, or associations, without legal standing; for the purpose of such an association, *viz.*, the liquidation of the property of the nationalized J. S. company, would have been illegal. It has been repeatedly assumed,[151] that after the nationalization, at least outside of Russia, a private liquidation company remained; this rests on two very dubious suppositions: (a) that actually a sufficient number of former shareholders are still to be found, (b) that the foreign property of those dissolved J. S. companies has not been transferred to the Soviet state.

In most cases only a small fraction on the former shareholders came together abroad and the former directorate hardly existed anywhere in full. One cannot understand why a chance meeting of a group of shareholders or of the former directorate, should form a private company to which the property of the perished J. S. company should have been transferred by universal succession *ex lege*, without a special process of law.

The second supposition is still more dubious.[152] To take the stand of Lord Wrenbury that the foreign property of the former J. S. companies has not been transferred to the Soviet state because it belongs to the liquidation companies of foreign law succeeding them, is anticipating what ought to be proved.

One solution offers itself: undoubtedly, the foreign shareholders might form a company of civil law. The fact that they continued abroad the business of the old J. S. companies justifies the assumption that they intended to take over the administration of the foreign property of the J. S. companies under the legal

[151] WOHL, J. W. (1925) 1300.

[152] *Supra*, note 121 and text, p. 630.

form of a civil company. During the time of non-recognition of the Soviet state, a foreign state was by no means able to assume that the ownership of the property of an old Russian J. S. company situated in its territory had been transferred to the Soviet state. On the other hand, the old J. S. companies no longer existed in Russia. If, with the Swiss Confederated Court, one follows consistently the doctrine of the real corporate entity of the so-called juristic personalities, one cannot deny the factual effectiveness of the dissolution of the old J. S. companies by the legislation and administration of the Soviet state. Accordingly, the property of those discontinued J. S. companies, as far as it was found abroad, had become *res nullius,* at any rate until the recognition of the Soviet state. The new company of shareholders and the old directorate took over the administration of this property; in this one might see an appropriation recognized by the state. In this case, those remnants of the organization of the former J. S. companies did not *remain* owners of the property abroad of the J. S. companies, but *became* such, which, as a practical result, is the same.

This solution meets with two objections. First, the intention of these former shareholders and members of the directorate uniting abroad was not to form a new company of foreign civil law and to appropriate for themselves the property of the old Russian J. S. company. Second, in those states which had not yet recognized the Soviet state the property there situate of the old Russian J. S. companies has not been considered *res nullius.* This would contradict the French view particularly, which declares the juristic person as a fictitious person created by the law. As far as the appropriation presupposes state recognition or the renunciation by the state of the exercise of its prerogative of appropriation, such recognition, or such renunciation, has nowhere been expressly declared nor has it been silently presupposed. For these reasons, the above solution must be rejected although certain considerations of equity would seem to favor it. Practically, the solution proposed is opposed by the uncontrollable accidental composition of the organizations of the former companies found abroad.

There remains then only the third possibility, *viz.*, that the foreign property of the old J. S. companies has been transferred to the Soviet state exactly like the Russian property. Against this may be urged the legal character of the nationalization as developed in the domestic Russian practice. The state acted as a sovereign person, as the bearer of the supreme power, not as *fiscus*. The law of nations forbids a state to exercise functions of sovereignty in the territory of another state, except where the so-called "international law" right of the official diplomats, etc., is concerned. But one must interpret the nationalization legislation and administrative practice in this sense, that the Soviet state intended only to transfer to itself, as fiscal successor in law of the old J. S. companies, their foreign property. This, indeed, has been repeatedly stated on the part of Soviet Russia.[153] In several instances the Soviet state has sued abroad for the surrender of the property of the former J. S. companies.[154] Only thus can it be explained that the main houses in Russia, after being transformed into departments of the People's Bank, attempted to correspond with their foreign branches. The nationalized main houses have issued instructions to the foreign branches. These have replied; an attitude which would be absolutely unintelligible between enterprises independent and legally separated from each other.[155] Now that the French government has declared that it intends to treat the French property of the old Joint Stock companies as belonging to the Soviet state—though this is not absolutely binding on the courts which are independent of the government—we are obliged to consider the transition to the Soviet state of the foreign property of the former Joint Stock companies as the most satisfactory solution.

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[153] A. KANTOROWITSCH, *supra*, note 17; *cf.* KLUTSCHNIKOW, INTERNATIONALE ANNALEN (Russian, 1924), No. 1, 13 *et seq.*; IGELSTRON, MESHDUNARODNAJA ZHISN (1923), No. 1.

[154] *Supra*, note 24 and text, p. 395.

[155] A. KANTOROWITSCH, *op. cit., supra*, note 17, at 42; [1923] 2 K. B. 636 *et seq.*